In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 4 2

EVELLE J. YOUNGER,
Appellant,

vs.

JOHN HARRIS, JR., et al.,
Appellees.

APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT

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SUMMARY OF ARGUMENT

Dombrowski v. Pfister, 380 U.S. 479 (1965), does not authorize federal intervention in this case. Appellees Dan, Hirsch, and Broslawsky, the district court found, stand in no danger of prosecution under the California Criminal Syndicalism Act. The mere existence of an arguably vague and overbroad state statute regulating expression or association does not create an actual case or controversy within the meaning of Article III, section 2 of the United States

Constitution. *Golden v. Zwickler,* 394 U.S. 103 (1969). The district court, therefore, exceeded its jurisdiction in reviewing separate and severable sections of the Syndicalism Act not involved in the prosecution of appellee Harris.

The district court erred in declining to abstain from declaring unconstitutional that provision of the Syndicalism Act under which Harris is charged. Abstention, or nonintervention, must be the rule where, as here, (1) statutory overbreadth results from vagueness, and (2) there is no showing of bad faith enforcement of the challenged statute. By clarifying an allegedly vague enactment, state courts may narrow the law so as to eliminate overbreadth, thereby allowing federal courts to avoid adjudicating the most delicate constitutional question: the extent of federal limitations on state power. Where state officials do not take advantage of vague language in a statute so as to expand its scope to include constitutionally protected conduct, the statute does not produce the intolerable "chilling effect" which demands federal intervention. Bad faith enforcement of the challenged statute is equally relevant to determining the propriety of federal declaratory and injunctive relief. *Dombrowski* did not hold otherwise. *Wells v. Reynolds,* 382 U.S. 39 (1965); *Cameron v. Johnson,* 390 U.S. 611 (1968); *Brooks v. Briley,* 274 F.Supp. 538 (M.D. Tenn. 1967), *aff'd mem.,* 391 U.S. 361 (1968).

Finally, because the Criminal Syndicalism Act is susceptible of a limiting construction readily to be anticipated as a result of the prosecution pending

against Harris, *Dombroswki* prohibited the district court from declaring it invalid.

ARGUMENT

DOMBROWSKI V. PFISTER DOES NOT AUTHORIZE FEDERAL INTERVENTION IN THIS CASE.

A. Absence of an Actual Case or Controversy.

Appellees Harris, Dan, Hirsch, and Broslawsky complained under the Civil Rights Act, 42 U.S.C. § 1983, attacking the California Criminal Syndicalism Act as unconstitutionally vague and overbroad and seeking an injunction against its enforcement. Harris was under indictment for violating a single provision of the Act, Penal Code section 11401(3). Dan, Hirsch, and Broslawsky were not accused of violating the Act, nor had the State engaged in any overt acts directed toward their conduct. Acknowledging that "our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky stand in any danger of prosecution . . . because of the activities that they ascribed to themselves in the complaint . . .," the three-judge federal court, acting upon the authority of *Dombrowski v. Pfister,* 380 U.S. 479 (1965), nevertheless declared unconstitutional on their face *all* sections of the Syndicalism Act. Brief for Appellant, 6-8.

The decision below, therefore, stands for the proposition that the mere existence of an arguably vague and overbroad state statute regulating expression or

association authorizes a federal court to declare it invalid. Anyone may seek federal equitable relief, as everyone has standing. *Contra, Dawkins v. Green,* 285 F.Supp. 772, 775 (N.D. Fla. 1968). The District Court's opinion has been understood to mean that "an injunction should issue whenever a statute might possibly infringe on first amendment freedoms despite the chance that it could possibly be interpreted in one state proceeding with 'requisite narrow specificity.'" *Note,* 69 Col.L.Rev. 808, 812 n.32 (1969).

Dombrowski v. Pfister, however, does not authorize federal courts to strike down arguably vague state statutes simply because they exist. Federal intervention is appropriate only if the State has engaged in overt acts of enforcement resulting in irreparable injury, or "chilling effect." In *Dombrowski* all plaintiffs had been indicted and had been otherwise aggrieved by the systematic and abusive enforcement of the challenged state law.

The case or controversy requirement of Article III, section 2 of the United States Constitution marks a boundary beyond which the holding of *Dombrowski* may not be extended. We have previously urged that appellees Dan, Hirsch, and Broslawsky present no justiciable controversy. Therefore, the District Court exceeded its jurisdiction in reviewing separate and severable sections of the Syndicalism Act not involved in the prosecution against Harris. Brief for Appellant, 26-30. *Delta Book Distributors, Inc. v. Cronvich,* 304 F.Supp. 662 (E.D. La. 1969). *Golden v. Zwickler,* 394 U.S. 103 (1969), confirms our view.

B. Abstention is Proper Absent Bad Faith Enforcement of a Statute Challenged as Unconstitutionally Vague.

Appellee Harris presents an actual controversy. He alleged that the Syndicalism Act was on its face unconstitutionally vague and overbroad. The District Court interpreted *Dombrowski* as forbidding abstention. *Harris v. Younger,* 281 F.Supp. 507, 510-11 (C.D. Cal. 1968). We urge that Harris does not present a proper case for federal intervention in a state criminal prosecution.

Abstention, or nonintervention, must be the rule where (1) statutory overbreadth results from vagueness, and (2) there is no showing of bad faith enforcement of the challenged statute.

In such a case abstention permits state courts to invalidate challenged statutes, thereby eliminating a direct federal affront to state sovereignty. See, *e.g., Vogel v. County of Los Angeles,* 68 Cal.2d 18 (1967). Alternatively, state courts may clarify an allegedly vague enactment, thereby narrowing the law so as to eliminate overbreadth. See, *e.g., Danskin v. San Diego Unified School Dist.,* 28 Cal.2d 536, 171 P.2d 885 (1946); *People v. Epton,* 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), *cert. denied,* 390 U.S. 29 (1968). In the latter event, federal courts avoid a most delicate constitutional question: the extent of federal limitations on state power. *Cf. Ashwander v. TVA,* 297 U.S. 288, 346-48 (1936).

Abstention confers other benefits which may be enjoyed without chilling free expression: it avoids long delays in state criminal prosecutions; it reduces

the burden on federal district courts and on this Court; it encourages state courts to assume full responsibility for protecting federally guaranteed rights; it recognizes state courts as the ultimate arbiters of state law.

Dombrowski decided that a "chilling effect" upon First Amendment freedoms was an unacceptable price for the benefits of abstention. Mr. Justice Harlan has characterized the "chilling effect" doctrine as "amorphous," "slippery," and "ubiquitous." *Zwickler v. Koota,* 389 U.S. 241, 255, 256 n.2 (concurring opinion) (1967). Certainly, the concept is an amiable fiction deserving of scrutiny, *Golden v. Zwickler,* 394 U.S. 103 (1969), decided that the mere existence of an arguably unconstitutional statute regulating conduct in the First Amendment area did not produce an intolerable *in terrorem* or "chilling" effect. Nor does the good faith enforcement of such a law unacceptably inhibit free expression. Indeed, appellees here emphasize that publications appended to our opening brief are dated *after* Harris' indictment. Appellees' Supplemental Brief on Reargument, 17 n.19. The inadequate allegations of Dan, Hirsch, and Broslawsky reflect Harris' difficulties in discovering other plaintiffs actually inhibited by the Syndicalism Act, or by Harris' prosecution.

An unacceptable restraint on free expression may result where state officials take advantage of vague language in a statute so as to expand its scope to include constitutionally protected conduct. This occurred in *Dombrowski;* it did not happen here. Such

enforcement has the same effect as the enforcement of an overbroad statute. Given systematic and abusive enforcement of a vague statute, abstention may be improper. Absent a showing of bad faith enforcement, the balance falls in favor of nonintervention, in favor of permitting state courts to uphold state laws by construing them in a manner consistent with the requirements of the Constitution.

We view the absence of bad faith enforcement as equally relevant on the separate questions of declaratory and injunctive relief. We do not regard a judgment declaring a state statute unconstitutional to be a substantially lesser interference with a state's good faith administration of criminal justice than an injunction against future enforcement. Nor do we regard a declaratory judgment to be a permissible circumvention of the federal anti-injunction statute, 28 U.S.C. § 2283. *Cunningham v. A. J. Aberman, Inc.*, 252 F.Supp. 602 (W.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 747 (3d Cir. 1967). The same criteria should apply in determining the propriety of declaratory judgments and injunctions.

> "Statutory vagueness should be eliminated as an independent ground for intervention. The bad faith standard should be broadened to require consideration of the general pattern of police conduct toward the complaining group." *Comment*, 75 Yale L.J. 1007, 1037 (1966).

We do not ask that *Dombrowski* be abandoned, only that its limitations, recognized elsewhere, be acknowledged here. The abstention, or nonintervention, prin-

ciple we urge is consistent with this Court's decisions following *Dombrowski*. Federal intervention was demanded there because of bad faith enforcement of a statute both vague and overbroad. Arrests, seizures of records, and threats of continued prosecutions occurred despite efforts by the plaintiffs to vindicate their rights in successful state court actions.

In *Cameron v. Johnson*, 381 U.S. 741, 742 (1965), Justices Black, Harlan, and Stewart, dissenting, expressed their opinion that federal intervention was justified only when a vague and overbroad statute was enforced in bad faith. *Id.* at 748.

Plaintiffs in *Wells v. Hand*, 238 F.Supp. 779 (M.D. Ga. 1965), attacked the constitutionality of a Georgia statute forbidding the circulation of insurrectionary papers. Bad faith enforcement was alleged but not shown. *Id.* at 784. The District Court, being of the opinion that the statute was capable of a narrowing construction, refused to declare it unconstitutional on its face or to enjoin its enforcement.[1] This Court, per curiam, affirmed the decision of the District Court. *Wells v. Reynolds*, 382 U.S. 39 (1965). Our case differs from *Wells* only in that here bad faith enforcement is not alleged much less shown.

The impact of *Dombrowski* was next considered in *Zwickler v. Koota*, 389 U.S. 241 (1967). Zwickler attacked a New York statute exclusively on grounds of overbreadth, asserting that it punished conduct protected by the First Amendment. This Court held that

[1]The same statute later was declared unconstitutional on its face. *Carmichael v. Allen*, 267 F.Supp. 985 (N.D. Ga. 1966).

abstention from a declaratory judgment was inappropriate because the state law was not susceptible of a narrowing construction by state courts. *Id.* at 249-52, 256-57. This followed the holding of *Baggett v. Bullitt*, 377 U.S. 360 (1964), wherein the Court declined to abstain from passing on the constitutionality of a 1931 Washington loyalty oath because:

> "We doubt, in the first place, that a construction of the oath provisions, in light of the vagueness challenge, would avoid or fundamentally alter the constitutional issue raised in this litigation." *Id.* at 375-76.

Unlike *Koota* and *Baggett*, the question of overbreadth in our case may be resolved by a narrowing interpretation by California courts. Indeed, it is our position that such a limiting construction has been placed upon the Syndicalism Act. Brief for Appellant, 15-26.

Later, in *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court said "We viewed *Dombrowski* to be a case presenting a situation of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities. . . .'" 390 U.S. at 619. Some saw in this a step away from *Dombrowski:*

> "It must be assumed . . . that in *Cameron v. Johnson II* the Court retreated from its position in *Dombrowski* that the mere existence of a law unconstitutional on its face provides a basis for attacking it." *Note*, 69 Col.L.Rev. 808, 816 (1969).

In fact, *Dombrowski* did not hold that the mere existence of a statute warranted federal review.

On the authority of *Cameron II*, the Court then affirmed the decision of the District Court in *Brooks v. Briley*, 274 F.Supp. 538 (M.D. Tenn. 1967), *aff'd mem.*, 391 U.S. 361 (1968). *Brooks* held abstention appropriate where a state statute was attacked as vague and overbroad, absent a showing of bad faith enforcement.

> "While the *Dombrowski* opinion contains language which may be susceptible of the interpretation that abstention is never appropriate where statutes regulating expression are properly challenged for facial vagueness or overbreadth, we do not believe that the Supreme Court has committed itself to such a doctrinaire position where, as here, there is no predicate for finding a bad faith invocation or use of criminal laws, or chilling effects or irreparable injury if state criminal proceedings are allowed to continue. This would appear to be indicated by the Supreme Court's affirmance, after its *Dombrowski* decision, of Wells v. Hand. . . ." *Brooks v. Briley*, 274 F.Supp. at 550.

The principle to be distilled from the Court's decisions is this: abstention is proper where in a pending case a state court may, by clarifying a vague statute, eliminate overbreadth; provided that state officials have not exploited the uncertainty of the law by applying it without hope of conviction so as to discourage the exercise of protected freedoms. *Dombrowski* did not wholly discard the teaching of *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-177 (1959), that federal courts should not adjudicate the constitutionality of state statutes fairly open to interpretation until

state courts have been afforded a proper opportunity to pass upon them.[2] *Accord, Turner v. Labelle,* 251 F.Supp. 443 (D.C. Conn. 1966); *Duncombe v. State of New York,* 267 F.Supp. 103 (S.D. N.Y. 1967); *Zwicker v. Boll,* 270 F.Supp. 131 (W.D. Wis. 1967).

C. Dombrowski Does Not Authorize Federal Invalidation of California's Syndicalism Act Because It Is Susceptible of a Limiting Construction Readily to be Anticipated as a Result of the Pending Prosecution.

We have pointed out that in reviewing the Syndicalism Act, the District Court completely ignored several decisions by California appellate courts clarifying and limiting the terms of the statute. Brief for Appellant, 15-26. Words used by a state supreme court in construing a statute are as much a part of the statute as if the Legislature had put them there.

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[2]The entire Syndicalism Act was no more placed before the state courts by Harris than before the federal district court by all of the appellees. The state trial court was never afforded an opportunity to narrow the meaning of the Penal Code section 11401(3) by limiting instructions. *Cf. Brandenburg v. Ohio,* 395 U.S. 444, 448 (1969). The state appellate courts did not pass upon the merits of the constitutional challenge in denying Harris a writ of prohibition, for the writ is discretionary.

Harris complains that the state courts allowed his prosecution to proceed without requiring a showing that his conduct created a clear and present danger that a change in industrial ownership or political reform would result, a showing that his conduct constituted incitement to imminent lawless action, and a showing of specific intent to accomplish immediate political or economic change. Appellees' Supplemental Brief on Reargument, 7-15.

First, since the Act proscribes advocacy of violent acts for the purpose of achieving political or economic change, the state is obliged to show that a defendant's conduct gave rise to a clear and present danger of violent acts, not to a likelihood of social change. Second, the clear and present danger test is judicially imposed *after* the facts surrounding the charged offense have been developed at trial. Similarly, intent to incite others to imminent lawless action and conduct having the effect of incitement are factual matters to be shown at trial.

Winters v. New York, 333 U.S. 507, 514 (1948); *Albertson v. Millard,* 345 U.S. 242, 244 (1953). Nevertheless, the District Court overlooked *Danskin v. San Diego Unified School Dist.,* 28 Cal.2d 536, 545, 171 P.2d 885, 891 (1946), wherein Justice Traynor wrote that:

> "The Criminal Syndicalism Act can . . . be applied only when there is imminent danger that the advocacy of the doctrine it seeks to prohibit will give rise to the evils that the state may prevent."

Danskin thus narrowed the definition of advocacy proscribed under the Act to conform with the requirements of *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969). We adhere to our position that, as construed by our state courts, the Syndicalism Act is constitutional. As we did not rely upon *Whitney v. California,* 274 U.S. 357 (1927), holding that the statute is constitutional as enacted, the overruling of *Whitney* in *Brandenburg* does not affect our submission.

Appellees argue that the recited language in *Danskin* is dictum. Appellees' Supplemental Brief on Reargument, 14 n.15. Our disagreement on this point, however, is insignificant for the quoted statement by Justice Traynor surely cannot be authoritative or nonauthoritative according to a lawyer's esoteric distinction between dictum and holding.[3] *Danskin* and other state appellate decisions allay all reasonable

[3]Appellees' suggestion that the declaration in *Danskin* is nullified by *American Civil Liberties Union v. Board of Education,* 59 Cal.2d 203, 379 P.2d 4 (1963), is utterly devoid of merit. Appellees' Supplemental Brief on Reargument, 14 n.15.

fears that the Act can be applied to constitutionally protected conduct.

Assuming, however, that had the District Court considered relevant state court decisions, it could properly have concluded that they failed authoritatively to cure vagueness and overbreadth, it should have found reason in those decisions to abstain from declaring the statute unconstitutional.

Dombrowski expressly states that abstention is proper where "a readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution. . . ." *Id.* at 491. *Danskin, People v. Malley,* 49 Cal.App. 597, 194 Pac. 48 (1920), *People v. Flanagan,* 65 Cal.App. 268, 276, 223 Pac. 1014, 1017 (1924), and other state decisions supply a rehabilitating construction. California courts, which "regularly have shown full alertness to accept and be governed by the constitutional interpretations that are enunciated by the Supreme Court," should have been permitted to supply that construction in the Harris prosecution. *Harris v. Younger,* 281 F.Supp. at 510. *Compare People v. Epton,* 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), *cert. denied,* 390 U.S. 29 (1968). Instead, contrary to the inhibition of 28 U.S.C. § 2283, the prosecution pending against Harris was enjoined.

CONCLUSION

The District Court administered an overdose of the "strong medicine"[4] prescribed by *Dombrowski v. Pfister*. The decision of the District Court declaring the Syndicalism Act unconstitutional should be reversed. The injunction against appellant Younger should be dissolved.

Dated, February 20, 1970.

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[4]*Cameron v. Johnson*, 390 U.S. 611, 622, 623 (dissenting opinion of Mr. Justice Fortas) (1968).